NO. 192

IN THE

Supreme Court of the United States

October Term 1960

ROBERT S. LADD,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE RESPONDENT IN OPPOSITION

MILO J. WARNER
904 National Bank Building
Toledo 4, Ohio

WESLEY A. WILKINSON
1324 West Third Street
Cleveland 13, Ohio

Of Counsel:

DEALE, LEWIS & WARNER
904 National Bank Building
Toledo 4, Ohio

D. L. SEARS,
904 National Bank Building

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
REASON FOR DENYING WRIT	6
ARGUMENT	6
CONCLUSION	16

CITATIONS

Arnold v. L. & N. Rd. Co. (1960), 180 F. Supp. 429	14
Barker v. Southern Pac. Ry. Co. (9th Cir. 1954), 214 F. (2d) 918	14
Coats v. St. Louis-San Francisco Ry. Co. (5th Cir. 1956), 230 F. (2d) 798	12
Coleman v. Delaware & Hudson Rd. (Pa.) 42 L. R. R. M. 2775	14
Cunningham v. Erie Rd. Co. (2nd Cir. 1957), 266 F. (2d) 411	14
Dunahoo v. Thompson (Mo. 1956), 291 S.W. (2d) 70	14
Elgin, Joliet Ry. Co. v. Burley (1946), 327 U.S. 661	2 (footnote)
Erie Rd. Co. v. Tompkins (1938), 304 U.S. 64	8, 9

Page

Guszkowski v. U. S. Trucking Corp. (1958), 162 F. Supp. 847 14

Heary v. U. S. Trucking Corp. (1958), 161 F. Supp. 67 . 14

Illinois Central R. Co. v. Moore (5th Cir. 1940), 112 F. (2d) 959 8

Jorgenson v. Penn. R. Co. (N.J. 1958), 138 A. (2d) 24 . 13

Koppal v. Transcontinental & Western Air (1952), 199 F. (2d) 117 11

Majors v. Thompson (5th Cir. 1956), 235 F. (2d) 449 .. 13

Moore v. Illinois Central Rd. Co. (1941), 312 U.S. 630 ..... 6, 8 in footnote

Payne v. Pullman Co. (Ill. 1957), 141 N.E. (2d) 83 ... 13

People's v. Southern Pac. Ry. Co. (1955), 139 F. Supp. 783 14

Ringle v. Transcontinental & Western Air (1953), 113 F. Supp. 897 14

Rose v. Great Northern Ry. Co. (1957), 151 F. Supp. 806 14

Slocom v. Delaware, L. & W. R. Co. (1949), 339 U.S. 239 ..... 6, 10

Smithey v. St. Louis Southwestern Ry. Co. (8th Cir. 1956), 237 F. (2d) 637 14

Stack v. N.Y.C. Rd. Co. (2nd Cir. 1958), 258 F. (2d) 739 14

Transcontinental & Western Air, Inc. v. Koppal (1953), 345 U.S. 653 ..... 6, 7, 14, 15

Page

United Steelworkers v. Warrior and Gulf Navigation Co., 80 S. Ct. 1347 16

Von C. Higgensteel v. System Federation No. 9 et al. (Mich. 1953), 59 N.W. (2d) 278 2

STATUTES

28 U.S.C. §1257 ..... 1, 6

28 U.S.C. §1257 (3) 16

45 U.S.C. §151 6

45 U.S.C. §153 ..... 2 and footnote

45 U.S.C. §153 (i) 6, 7

MISCELLANEOUS

61 A.L.R. (2d) 14

NO. 192

IN THE

Supreme Court of the United States

October Term 1960

ROBERT S. LADD,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Ohio will be found in Appendix A, pp. 3-46 of the Petition for Certiorari. Neither the trial court nor the Court of Appeals for the Sixth Appellate District of Ohio wrote an opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. Since the invalidity of statute is not claimed here, presumably petitioner is contending that this case qualifies as involving a title, right, privilege or immunity claimed under the statutes of the United States.

Respondent denies that any such right or immunity is

asserted and respectfully submits that this Court does not have jurisdiction to grant the writ. Nowhere in his brief does petitioner set up or claim any title, right, privilege or immunity under federal statutes or under the Constitution of the United States.

QUESTIONS PRESENTED

Although petitioner has set forth three nominally separate questions* as being presented for review, it is respectfully submitted that there is only one question presented by the petition, to-wit:

Should a writ of certiorari issue to the Supreme Court of Ohio to review a judgment declaring that a common law action for damages for a claimed wrongful discharge brought by a railroad employee against his employer was prematurely brought under Ohio law where the employee had failed to exhaust the administrative remedies provided by his collective bargaining agreement and the Railway Labor Act, 45 U.S.C. §153?

STATEMENT

This is a common law action for damages for breach of an employment contract. The contract is a collective bargaining agreement entered into between petitioner's

*Petitioner's third question is an attempt to inject the evidence of alleged fraud into this hearing. There was no finding of fraud by the jury which returned a *general verdict* only. This issue, as is true of other issues raised by the evidence, was not considered by the Supreme Court of Ohio because it held the action to have been prematurely brought under the Ohio law. The claim of fraud like all other fact issues should have been submitted to the Adjustment Board by petitioner. He doesn't require his union's approval or aid to do this. *Elgin, Joliet Ry. Co. v. Burley* (1946), 327 U.S. 661; *Tom C. Hargrove v. System Federation No. 9 et al.* (Mich. 1953), 59 N.W. 2d 278; 45 U.S.C. §153 (i). In any event this issue arising in a common law action for breach of contract is purely a local matter requiring application of Ohio law and does not require the consideration of the Supreme Court of the United States.

Petitioner's first and second questions are both contained in the single question, as above stated by respondent.

union, The Brotherhood of Locomotive Engineers, and the respondent. The gravamen of petitioner's complaint was that in violation of his seniority rights he had been disqualified from work by a wrongful diagnosis of epilepsy on the part of respondent's medical department.

Petitioner instituted this action against respondent in the Court of Common Pleas of Lucas County, Ohio, on January 19, 1956, alleging:

> "Plaintiff further states that he has fully complied with all the conditions required of him by defendant under the terms of employment between the parties as set forth in printed agreements entered into by and between the defendant and Grand International Brotherhood of Locomotive Engineers for the benefit of all its enginemen, including the plaintiff herein, and became entitled to remain an engineer in the employment of the defendant with seniority rights and benefits arising out of his employment under the provisions of said printed agreements by and between the parties."

After alleging that respondent's medical director had "wrongfully and mistakenly" diagnosed him as an epileptic and that the diagnosis was "incorrect as the defendant well knew", petitioner alleged in Paragraph 6 of his petition as follows:

> "Plaintiff says that his disqualification by the defendant was in direct violation of his contract of employment; * * * that he is bringing this action against the defendant for breach of said contract of employment * * *."

Respondent's answer admitted the petitioner's employment but denied that he had complied with all of the conditions required under the terms of the collective bargaining agreement and particularly Rule 9 thereof which provides:

"An employee who fails to qualify on examination by the company surgeon and whose condition warrants temporary or permanent retirement from the service, may be re-examined on his own time by the chief surgeon, and, if such employee desires, he may be accompanied by his local chairman and by a physician of his own selection whose fee he shall assume. The decision of the chief surgeon is final, subject only to appeal through the General Committee and the operating officials to be designated on the several railroads." (R. 4)

(R. 4)

Trial commenced before a jury on September 9, 1957. The pertinent facts were as follows:

Petitioner became employed by respondent as a locomotive fireman in 1941. On December 7, 1951, he had convulsive seizure while on duty on a diesel locomotive moving a cut of cars from one yard to another in the Toledo area. He described it as a severe attack of indigestion involving nausea and vomiting (R. 38), but the other two crewmen who were on the locomotive both testified that petitioner had had convulsions and lost consciousness. (R. 141-143, 346-350)

This seizure gave respondent immediate concern and petitioner was sent to the company's doctor in Toledo for examination on December 12, 1951. (R. 260) He was sent to Detroit on the following day to be examined by a surgeon in the respondent's chief surgeon's office. (R. 238-242, Defendant's Exhibit 12, R. 422, 423) On the basis of the separate medical reports of these two doctors, the chief surgeon disqualified petitioner from further work around moving machinery. (R. 266) Petitioner was placed on an inactive status as a physically disabled employee. (R. 179)

Petitioner consulted a neurosurgeon in Toledo who

agreed with the railroad doctors that he suffered from fainting spells but disagreed as to the cause thereof. (R. 120, 122, 134, 431, 432. Defendant's Exhibit 28) Petitioner sought the assistance of his union representatives and during early 1952 there were numerous conferences between officials of the Brotherhood of Locomotive Engineers and the respondent railroad concerning the physical condition of petitioner.

The collective bargaining agreement contained detailed provisions respecting physical disqualification of employees. (R. 10-12) It was finally agreed between the chief grievance chairman of the Brotherhood and respondent's assistant general manager to have petitioner examined by a neutral doctor, both sides to abide by the result. (R. 161-177, 212, 220) A Detroit neurosurgeon was selected and conducted an examination lasting twelve days in September, 1952. He concluded that the petitioner's fainting spells were due to epilepsy, confirming the opinion of respondent's medical staff. (R. 295-299)

The respondent's assistant general manager, who was the chief operating officer designated to hear such appeals, acted on the report of the neutral doctor and disqualified petitioner from work around moving machinery on the basis of physical disability. The Brotherhood of Locomotive Engineers accepted this decision. Petitioner made no appeal to the National Railroad Adjustment Board.

The trial resulted in a jury verdict of $50,000.00 for petitioner, which was affirmed by a divided Ohio Court of Appeals. The Ohio Supreme Court granted certiorari and after a full hearing reversed the lower courts and rendered final judgment for respondent by an unanimous decision. The Ohio Supreme Court held that under Ohio law petitioner was required to exhaust the administrative remedies provided by his collective bargaining agreement and

the Railway Labor Act, 45 U.S.C. §153 (i). (Appendix A, Petition for Writ of Certiorari and reported in 170 O.S. at p. 491)

REASON FOR DENYING WRIT

It is respectfully submitted that the writ should be denied for the reason that no federal question is involved.

ARGUMENT

The sole question presented by this writ of certiorari is whether the Railway Labor Act, 45 U.S.C. §151 et seq., as construed by this Court in *Moore v. Illinois Central Rd. Co.* (1941), 312 U.S. 630, *Slocum v. Delaware, L. & W. R. Co.* (1949), 339 U.S. 239, and *Transcontinental & Western Air, Inc. v. Koppal* (1953), 345 U.S. 653, bars the application of state law requiring a railroad employee to exhaust the administrative remedies accorded him by his collective bargaining agreement and the Railway Labor Act, 45 U.S.C. §153 (i), before seeking damages in a common law action for breach of the collective bargaining agreement.

The issue as to the necessity of exhausting administrative remedies arising as it did in a common law action for breach of contract was determinable under Ohio law where the cause of action arose and the contract was to be performed. There is no claim of right, title, privilege or immunity under federal statute or the Constitution of the United States and consequently this writ should be denied on the basis of a lack of jurisdiction under 28 U.S.C. §1257.

This statute requires that a petitioner must "specially set up or claim" such federal right, title, privilege or immunity. In the instant case just the reverse is true. Petitioner has based his cause of action solely on the common

law of Ohio applicable to contracts. He has never claimed, nor can he claim, that the Railway Labor Act or any other federal statute supports his cause of action. He cites a section of the Railway Labor Act (45 U.S.C. §153 (i)*) at p. 5 of his petition as being the federal statute involved, but (as will be argued hereinafter in this brief) this statute merely confirms what is conceded on all sides herein to be the law, to-wit: federal law does not require an employee to appeal to the Adjustment Board. Petitioner bottoms his action not on this statute but on the common law of Ohio, and it is the Ohio law that he now objects to because it requires him first to appeal to the Adjustment Board. It is incongruous for petitioner now to seek federal jurisdiction and relief after deserting the remedies provided by the Railway Labor Act and turning his back upon and repudiating them.

Aside from the question of jurisdiction the writ should be denied on the ground that the United States Supreme Court has already passed on the precise question presented* by this case and has held that the law of the state involved is controlling and that no federal question is involved. The judgment of the Ohio Supreme Court in this case constitutes a pronouncement of applicable Ohio law and does not interpret or purport to interpret federal law.

The United States Supreme Court stated at p. 662 in the hearing on the merits in the Koppal case:

---

*The grant of writ of certiorari was limited in Koppal to the following two questions:

"1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

"2. Whether the decisions of this Court in Moore v. Illinois Central R. Co., 312 U.S. 630, and Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act." 344 U.S. 933.

> "On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

The Koppal case had been admitted to resolve differences of opinion concerning the effect of the Moore and Slocum cases. The Moore case, arising out of the State of Mississippi, involved an action by a railroad employee against his employer for damages for wrongful discharge. The district court rendered a judgment for plaintiff whereupon the Circuit Court of Appeals reversed on the ground that the Mississippi statute of limitations barred the action. *Illinois Central R. Co. v. Moore* (5th Cir. 1940), 112 F. (2d) 959. In so doing the Circuit Court refused to follow the previous holding of the Supreme Court of Mississippi and held that the doctrine of *Erie v. Tompkins* (1938), 304 U.S. 64, did not apply to disputes between interstate rail carriers and their employees under their collective bargaining agreements because not a "local matter". The United States Supreme Court granted certiorari and reversed* the Circuit Court of Appeals holding that the applicability of the statute of limitations was a local matter and that the Federal Courts were bound by the law of Mississippi as pronounced by the Supreme Court of that

---

*Moore v. Illinois Central R. Co. (1941), 312 U.S. 630.

state. (Mississippi law did not require exhaustion of administrative remedies.)

The United States Supreme Court also stated in its opinion that the *Railway Labor Act* did *not* require an employee to exhaust the administrative remedies available to him under the Act as a prerequisite to filing a suit in court. Petitioner makes much of an amendment to the Act in 1934 which substituted "may" for "shall".* He has quoted the Moore case at p. 9 of his petition to support his contention that this change in statutory language is of significance in this case. However, the excerpt quoted by petitioner was taken out of context and failed to complete the Court's comment on the change of phraseology in the Act which was as follows at pp. 635-636:

> "This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that the petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

A railroad employee *never has been required* by federal law to appeal to the Adjustment Board as a condition precedent to filing a wrongful discharge action. Therefore, the amendment on which petitioner relies so strongly is of no importance or materiality in the instant case.

---

*"be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * * *"

The Court in the Moore case did not refer to the applicability of local substantive law and it was this omission which caused a divergence of opinion as to the effect of the Moore case after the Slocum decision was announced.

Slocum v. Delaware, L. & W. R. Co., supra, was an action for declaratory judgment instituted by a railroad against two competing unions. A state court assumed jurisdiction, interpreted the collective bargaining agreements and entered judgment. The United States Supreme Court granted certiorari and reversed on the ground that an inter-union dispute over interpretation of a collective agreement with the railroad encompassed future relations of the parties as well as past and that the Railway Labor Act conferred exclusive jurisdiction over such disputes on the National Railroad Adjustment Board. The Moore case was distinguished in the following language at p. 244:

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U.S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."

Despite the foregoing language a difference of opinion arose as to the effect of Moore and Slocum on the right of an individual railroad employee to bring a common law breach of contract action for wrongful discharge against the railroad, i.e., what substantive law controlled this right. The Moore case had already held that federal law was em-

bodied in the Railway Labor Act did not require exhaustion of administrative remedies; but the further question arose: Did federal law as construed in the Moore case also *preclude* state substantive law from so *requiring?* This was the controversial question which needed answering when the Koppal case arose.

Transcontinental & Western Air, Inc. v. Koppal, supra, was an action for damages for wrongful discharge instituted in a Federal District Court in Missouri. The action was one at common law for breach of a collective bargaining agreement entered into under the Railway Labor Act. The plaintiff recovered a verdict but the trial judge granted judgment notwithstanding on the ground that Missouri law required plaintiff to have first exhausted his administrative remedies. The Circuit Court of Appeals reversed on the ground that Federal substantive law rather than State substantive law controlled on this question.* *Koppal v. Transcontinental & Western Air* (1952), 199 F. (2d) 117. One judge dissented stating that in his opinion the Moore case did not sanction the application of Federal substantive law.

The Supreme Court of the United States granted certiorari to resolve this question and reversed the Circuit Court, stating at p. 654:

> "This case presents two questions: (1) whether a discharged employee of a carrier that is subject to the Railway Labor Act is precluded by that Act from resorting to a state-recognized cause of action for wrongful discharge and, if not, (2) whether, in such action he must show that he has exhausted his administrative remedies, under his contract of employment. For the reasons hereafter stated, our answer to the first question is no and to the second, yes, provided the

* and that it had already been determined in Moore that federal law did not require exhaustion of remedies.

applicable state law so requires."

At p. 661 this court further stated:

> "The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge *if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law.*" (Emphasis ours)

Thus the Koppal case answered the question raised by Moore and Slocum and made it unmistakably clear that state substantive law is determinative of the right of the railroad employee to seek damages in a common law action for damages for breach of a railroad collective bargaining agreement.

Subsequent decisions of lower courts, both federal and state, have uniformly followed this rule without equivocation or divergence of opinion.

In *Coats v. St. Louis-San Francisco Ry. Co.* (5th Cir. 1956), 230 F. (2d) 798, it is stated at p. 801:

> "The case of Transcontinental & Western Air, Inc. v. Koppal, supra, holds that the Board does not have exclusive jurisdiction over the claim of an unlawfully discharged employee if the state law provides a remedy. But in seeking relief in court, administrative remedies must be first exhausted if the state law so requires."

In *Majors v. Thompson* (5th Cir. 1956), 235 F. (2d) 449, the court held (p. 451):

> "Where required by state law, the employee seeking damages for wrongful discharge must exhaust his administrative remedies before being able to maintain an action in a Federal District Court. Transcontinental & Western Air, Inc. v. Koppal * * *."

In *Jorgenson v. Penn R. Co.* (N.J. 1958), 138 A. (2d) 24, the Supreme Court of New Jersey reviewed a wrongful discharge case instituted by a railroad employee who had not exhausted the administrative remedies afforded by his collective bargaining agreement and the Railway Labor Act. The Court granted final judgment for the railroad on the ground that New Jersey law required such exhaustion of administrative remedies stating at p. 32:

> "Accordingly, under the rule of the Koppal case, the New Jersey courts have jurisdiction to adjudicate wrongful discharge cases where an employee seeks damages, and are free to interpret the collective bargaining agreement in light of the substantive law of this State to determine whether such as (*sic*) cause of action may be maintained."

In *Payne v. Pullman Co.* (Ill. 1957), 141 N.E. (2d) 83, the Court in commenting on the Moore, Slocum and Koppal cases stated at p. 85:

> "The net effect of these cases was to define an area within which the jurisdiction of the Railway Adjustment Board was exclusive and another area within which resort could be had to the courts. When in a proper case resort is had to a state court, it becomes subject to such defenses as are lawful in that state. This includes questions such as are here involved, that is:
>
> 1. Whether plaintiff was required to exhaust the remedies provided in the agreement * * *."

Also see: *Barker v. Southern Pac. Ry. Co.* (9th Cir. 1954) 214 F. (2d) 918; *Cunningham v. Erie Rd. Co.* (2nd Cir. 1957), 266 F. (2d) 411; *Smithey v. St. Louis Southwestern Ry. Co.* (8th Cir. 1956), 237 F. (2d) 637; *Stack v. N.Y.C. Rd. Co.* (2nd Cir. 1958), 258 F. (2d) 739; *Arnold v. L. & N. Rd. Co.* (1960), 180 F. Supp. 429; *Guszkowski v. U. S. Trucking Corp.* (1958), 162 F. Supp. 847; *Henry v. U. S. Trucking Corp.* (1958), 161 F. Supp. 67; *People's v. Southern Pac. Ry. Co.* (1955), 139 F. Supp. 783; *Ringle v. Transcontinental & Western Air* (1953), 113 F. Supp. 897; *Rose v. Great Northern Ry. Co.* (1957), 151 F. Supp. 806; *Dunahoo v. Thompson* (Mo. 1956), 291 S.W. (2d) 70; *Coleman v. Delaware & Hudson Rd.* (Pa.) 42 L. R. R. M. 2775. Also see 61 A.L.R. (2d) at p. 929.

Petitioner contends that the Supreme Court of Ohio has misinterpreted the Railway Labor Act by holding that he must exhaust the administrative remedies afforded by that Act. He also asserts at p. 15 of his brief that the Koppal case holds that exhaustion of administrative remedies does not include an appeal to the Adjustment Board unless the collective agreement specifically so provides.

Petitioner is wrong on both counts.* The Supreme Court of Ohio conceded in its opinion that the Railway Labor Act as construed in the Moore case does not require an exhaustion of administrative remedies. The Court did hold, however, that such exhaustion of administrative remedies was required to sustain a common law breach of contract action *under Ohio law.* The Court stated at p. 503: (170 O.S.)

"It is also established in the Koppal case, that, where a state requires the exhaustion of adminis-tra-

*Petitioner is also wrong at p. 22 of his brief wherein he states that he had "admittedly exhausted all his administrative remedies provided for in the collective bargaining agreements * *." Respondent denied that allegation and the Ohio Supreme Court specifically held that petitioner had not exhausted the administrative remedies.

tive remedies, the plaintiff must establish that fact before he may perfect his suit in the state court.

"Ordinarily, an action in a court of this state for alleged wrongful discharge is based on an agreement between employer and employee where there are no provisions embodied in the agreement specifying procedures for settlement of disputes. However, where contractual procedures are provided (as here) in an agreement between a carrier and a brotherhood under the authority of the Railway Labor Act and containing a complete administrative remedy, it would be very incongruous not to adhere to our rule that where administrative remedies are provided they must be exhausted before an action may be perfected in court. The facts of this case may be novel but the principle is not.

"* * * * The administrative remedy was fully provided even though not federally required. The plaintiff, having completed the procedures prescribed in the bargaining agreement itself, did not exhaust the administrative remedy statutorily afforded him, so that we are not persuaded to plaintiff's contention in this respect."

The Koppal case leaves this question to the state law involved and in no way limits the jurisdiction of the state courts in determining whether exhaustion of administrative remedies is required or in determining what acts shall constitute such exhaustion.

The Ohio Supreme Court held that the collective bargaining agreement involved herein when read in conjunction with the Railway Labor Act provided a complete system of arbitrament for employee grievances which petitioner had to follow under Ohio law as a condition precedent to filing suit. The Ohio Court was construing the Railway Labor Act solely for the purpose of determining what administrative remedies were available to petitioner under

his contract of employment. In so holding the Ohio Supreme Court was adopting a philosophy which the United States Supreme Court expressed in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 80 S. Ct. 1347, announced June 20, 1960.

Petitioner now in the Supreme Court of the United States seeks for the first time to inject an extraneous consideration never previously mentioned in the lower courts, namely, a portion of a 1948 collective bargaining agreement respecting time limit on claims in Appendix B of his petition. This agreement was not in the evidence, is not in the Record, and was never mentioned in the courts below (as petitioner concedes at p. 20 of his petition).

Since Appendix B has been introduced into this case for the first time at this level, it is not entitled to any consideration. However, it is submitted that it has no bearing on the issues involved in this Court in any event. The applicability of the time limit specified therein is determinable solely under Ohio law. Furthermore, it will be noted that this six month's time limit would have been applicable to this action as well as an appeal to the Adjustment Board so that if available as a bar to the Adjustment Board appeal it would have been equally available as a bar to this suit.*

CONCLUSION

It is respectfully submitted that the United States Supreme Court has no jurisdiction to review this case inasmuch as petitioner has not asserted any right, title, privilege or immunity under Federal statute or constitution, as is required by 28 U.S.C. §1257 (3).

*Petitioner did not file this action until one year after he was finally notified that he would not be reinstated. See page 7 of his petition.

The petition should also be denied for failure of petitioner to bring himself within Rule 19 of the United States Supreme Court. No federal question is involved in the judgment of the Supreme Court of Ohio, which is sought to be reviewed here. That court was merely enunciating the law of Ohio pertaining to the necessity of exhausting administrative remedies as a condition precedent to a common law action for damages for breach of an Ohio employment contract.

Respectfully submitted,

MILO J. WARNER
904 National Bank Building
Toledo 4, Ohio

WESLEY A. WILKINSON
1324 West Third Street
Cleveland 13, Ohio

Of Counsel:

DOYLE, LEWIS & WARNER
904 National Bank Building
Toledo 4, Ohio

D. L. SEARS
904 National Bank Building
Toledo 4, Ohio

ANDREW E. ANDERSON
904 National Bank Building
Toledo 4, Ohio

THE TOLEDO BLADE PRINTING CO